

Position paper

Direct participation of CSOs in the working groups to conduct accession negotiations with the European Union –
The Curious Case of Montenegro



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by Jovana Marović^[1]

Main thesis:

Considering the seven-year experience of participating in the Chapter 23 Working Group^[2], as well as taking into account all the drawbacks and benefits of such engagement, which will be outlined above, I consider that civil society's direct participation in the negotiating working groups is positive for the following reasons:

FOR

Access to Information

If there were no civil society representatives in the working groups, the sector and the public would not be aware of some of the documents that are an integral part of the negotiation process. CSO representatives not only made sure that they had access to these documents, but also made them available to the public.

Increased the transparency of the negotiations

As civil society representatives managed to pressure the Government to publish important documents from the negotiation process, they increased the overall transparency of the process.

A clear picture from the inside of how negotiations are going on and what are the main issues in communication between competent institutions and in reporting

There are various problems within the negotiating structure itself, in communication and coordination, especially between line ministries responsible for Chapter 23 (Justice and formerly European Affairs, now Office for European Integration), which are not visible from the outside. As civil society representatives are aware of these issues, it is possible to devise models to overcome them.

Media and international stakeholders' interest in "look from the inside"

As a rule, the media and international stakeholders are extremely interested in the experiences, impressions and impartial evaluation of those inside the negotiating structure, which leaves them more room to advocate for change.

[1] Executive director of the Politikon Network, a think tank based in Podgorica, a member of the Balkans in Europe Policy Advisory Group, and a member of the Working Group for Chapter 23, Judiciary and Fundamental Rights, within Montenegro's EU accession negotiations.

[2] Judiciary and Fundamental Rights

Better planning of the advocacy activities

The best model for monitoring the negotiation process involves different channels for civil society involvement in the decision-making process. Therefore, any additional source of information is good for better planning of activities.

AGAINST

Limited Impact on Final Reports

Although civil society representatives are members of negotiating working groups on an equal basis with the civil servants (on paper), in practice they are often outvoted (because of the number of civil society representatives comparing to the number coming from the public administration), and this is usually happening also in the working groups dealing with legislative changes.

For example, Article 14 of the Rules of Procedure (Chapter 23) specifies that, when necessary, conclusions are reached by a majority of the members present at the working group's session; while a member of the working group may exclude the opinion, which will be stated in the minutes from the session. However, the minutes are not public as a rule, but most of them were published based on requests for free access to information by a local NGO.

Intro:

Decision of the Montenegrin Government to include civil society representatives directly in the negotiating structure does not have footing in comparative practice. Civil society (academia and professional organizations) participated in Croatia in a certain capacity and in the wider composition of the working groups, but for the first time in Montenegro, the non-governmental sector is directly involved in the negotiating structure and in all the working groups. This model has two goals, by establishing it the Government wants to:

- Make use of all available capacity in the society, and this is especially desirable in countries where civil society is developed and visible and public administration capacities are limited and unprepared for the challenges stemming from the European integration process;

- Send a message that there is nothing to be hidden and that it wants to lead the most demanding phase of the European integration process on a transparent basis. In this sense, this model is recommended for all candidate countries.

The civil society involvement in negotiating working groups may not be directly foreseen in the Decision establishing the negotiating structure, but there must be room in the regulation for involvement of the expert community.[3]

[3] Decision on the establishment of structure for the accession negotiations of Montenegro in European Union "Off. Gazette of Montenegro", no. 09/2012, 15/14

Debating key dilemmas:

So far, many issues and different interpretations have emerged in practice, such as whether, NGOs and their representatives participating in the working groups:

lose their corrective role if they participate directly in negotiating structure?

give legitimacy to Government decisions?

Not! Negotiating working groups do not adopt public policy, in this case draft negotiating positions, reports on the implementation of action plans for negotiating chapters, etc. The working groups are only preparing, while the last word is on the Government, which can amend these documents (same as with all other regulations). Moreover, and in accordance with the Rules of Procedure, all members of the working group can take a stand and insist that a different view has to be noted in the minutes, and they also share their views with the public. In this procedural sense, work in negotiating working groups is not significantly different from work in working groups dealing with legislative changes. The principle is the same: CSO advocate and propose the best solutions, and must use all available channels in order to affect the quality of public policy.

have the right to communicate developments in the negotiating working group to the public?

Article 15 of the Rules of Procedure of the Working Group for Chapter 23 specifies that the Chief Negotiator, a member of the Negotiating Group, the Head of the Working Group, or a member of the Working Group authorized by the Head, may inform the public about the work of this Group. This provision has been tricky and challenging for civil society representatives from the very beginning. Their view is that work outside the working group cannot be separated from that within the group itself, and that the Government cannot interfere within this segment of civil society's work (that is the right to inform the public about what an NGO representative had to say on a particular topic). Although this provision formally still exists in the Chapter 23 Rules of Procedure, there is "tacit agreement" on this and civil society representatives inform the public about all segments of the working group's work. They cannot speak on behalf of the working group, which is certainly not in the area of their interest.

the selection procedure well organized and transparent enough?

The procedure for appointing members of the working groups did not rely on the decree on the way of participation of civil society representatives in the working groups dealing with the legislative changes during the first two public calls for Chapters 23 and 24, but on its own peculiarities.

The mandatory form that the interested parties had to fill entailed "evaluation" of the candidates based on the experience of the organization, but also on the qualifications of the individuals (see appendix). During the July 2019 public call for the working group 24, a form provided by the decree on the selection of NGO representatives to the state administration's working groups was used.[4] In practice, the Government can reject individual proposals (which happened once without any justification), but also reverse such a decision (under public pressure, which also happened with the same case). The Chief Negotiator may, in accordance with the Decision on Establishment of the Negotiating Structure, propose other experts if he/she thinks they can contribute to the process.

represent the whole civil society or only those who proposed them?

Civil society is not uniform, often with differing views on pressing issues, whether in approach to resolve it or possible consequences, and it is, therefore, impossible to expect that one individual will be able to speak on behalf of all NGOs. They are doing it in the sense of advocating the principles of transparency, accountability and effective control of the executive. However, all the civil society representatives are selected in the working groups because of their expertise in a particular area, and they represent their views in that particular field and the views of their own organization. However, CSO representatives in the working groups are also a kind of bridge between civil society and the negotiating structure, as they are open to present other proposals and initiatives and to propose putting them on the agenda.

should be paid for their work in the negotiating working group?

Unlike the members coming from public administration, whose reporting on particular activities and measures falls within the scope of their regular activities, by participating in the working groups the civil society representatives do not carry out the work for which they are primarily paid.

At the outset, shortly after the establishment of the working groups for Chapters 23 and 24 in March 2012,[5] the problem arose with the "wording" in the Decision on the Establishment of the Negotiating Structure, under which a member of the working group is financed by his/her own institution. Of course, this formulation is rational for those members coming from the public sector, but it is controversial for members from the civil society, and such provision, for example, prevented them from participating in explanatory screenings in Brussels (given that these were not project activities and that there is usually no budget line for such costs).

[4] Public call to NGOs to nominate a representative for a member of the Working Group for Chapter 24 - Justice, Freedom and Security, 16 July 2019, <https://www.eu.me/mn/press/saopstenja/pregovori-o-pristupanju/item/3939-javni-poziv-nevladinim-organizacijama-za-predlaganje-predstavnika-ce-za-clana-icu-radne-grupe-za-pregovaracko-poglavlje-24-pravda-sloboda-i-bezbjednost>

[5] In line with the new European Commission's approach, the most demanding chapters on the rule of law are opened at the beginning and remain open until the end of the negotiations, working groups for these two chapters were established first

Other issues - Consider when deciding!

Confidentiality

All members of the working group are required to sign a statement that they will keep classified information, and such statement is "renewed" from time to time in accordance with changes in the working groups' memberships.

Out-dated action plans

The Action Plans for Chapters 23 and 24 have been adapted only once so far in 2015. The Head of the Working Group for Chapter 23 has repeatedly informed members that the European Commission does not insist on adapting the plans,^[6] while the Government considers that this would be a huge task and would only mean an additional work for already weak capacities, and that this work should only be taken once the Commission has submitted the closing benchmarks. However, as it cannot be foreseen when this will happen (which is due to a lack of results in the areas related to the rule of law, but also due to the current European Commission's policy towards the Western Balkans), out-dated action plans affect the work of the working group (to persistently report on the same measures that neither achieve the goal nor affect change). Action plans should be updated on an annual basis, in line with the priorities for that year.

The nature of the negotiating structure affects transparency

Although the Government has decided to extend the mandate of the working groups to report on the implementation of the action plans, which is again a novelty not recorded in other countries who had previously negotiated membership, with the establishment of the Rule of Law Council in 2014, the role of the working groups for Chapters 23 and 24 has been completely reduced to technical level. Namely, this body was set up to exert some kind of political pressure on those institutions that are late in fulfilling their obligations, but there is no room for representatives of the civil society there and its sessions are closed to the public. Moreover, even those representatives of the civil society who are members of the Chapters 23 and 24 Working Groups cannot be informed of what has been discussed at Council meetings. Paradoxically, they, as members of the working groups, may propose a topic for a Council session, but not be informed on the debate.

[6] Information from the working group for Chapter 23 in Montenegro

Conclusion

As has already been pointed out, the involvement of civil society in the negotiating working groups has more positives than negatives. On the one hand, it is an opportunity to inform the public about the process, problems and results. On the other hand, it is civil society's obligation to use all available mechanisms to fulfil their corrective role in society and to assist/encourage democratization. In this case, it is of particular importance to carefully design the procedures for the work of these groups and especially the participation of civil society in them, without discriminatory and non-transparent solutions. Therefore:

01

Selection of civil sector representatives in the working groups should be made through a public call;

02

Appropriate form (with possible criteria) through which is possible to gain insight into the candidates and NGO qualifications should be developed, and published for all candidates at the end of the procedure; CSOs can help in developing such form;

03

Since the negotiation process is exhaustive and external support required, all candidates who have the necessary experience and knowledge should be involved;

04

CSOs membership in working groups should not be exclusive;

05

CSOs participation in the negotiating team (that negotiates directly with the EU) can provoke and encourage numerous controversies and should, therefore, be avoided;

06

All documents from the negotiation process should be made public;

07

CSOs members also should make available to the public any information they receive through the negotiating working groups (except those labelled as internal);

08

Civil society should insist that all minutes of working group meetings should be made available to the public;

09

The establishment of bodies such as the Rule of Law Council should not be dismissed *a priori*, but its work should be fully open to the public. Civil society should suggest channels for communication between this body and NGOs;

Appendix: Application form for candidates in Montenegro^[7]

I NGO

Name:

Address:

Registration number and date of registration in the NGOs Register:

Phone, Fax and Email:

Representative:

Tax ID:

Members of the organization:

Number of full-time employees:

Membership in the networks, coalitions, alliances, international organizations relevant for participation in the negotiation process:

Activity specified in the Statute:

Budget:

How the organization can contribute to the negotiation process:

Specify the name of the negotiating chapter (and part of the chapter) and how the organization can contribute by participating in the working group:

Projects, research, publications (which support the NGO candidacy in a specific negotiating chapter) with indicators:

External experts (first name, last name, area of expertise):

[7] Used during a public call for Working Groups 23 and 24 in 2017

II Candidate

Name and Surname:

Title of the negotiating chapter (clearly specifying the area of the acquis for which the candidate is competent):

Publications published by the candidate in the specific field of the acquis:

Education:

Work experience:

NGO member from:

English language level (A1/2, B1/2, C1/2)

Other foreign languages:

Contact:

III Suggestions



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